IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-451

UNITED STATES OF AMERICA,
Petitioner,

vs

THOMAS GRIFFIN and CATHERINE TUCKER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR GRIFFIN TUCKER IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-4a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. B, pp. 5a-6a) was entered on August 21, 1974. On September 11, 1974, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including October 19, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Whether the Court of Appeals was correct in holding that the District Judge was clearly right in finding that the Government had not established exigent circumstances to warrant the forceable entry without a search warrant.

2. Whether the Government's reliance upon the "inevitable" theory is proper under the instant facts.

COUNTER-STATEMENT OF FACTS

(Figures in parentheses refer to pages of the transcript)

The defendants are charged in a three-count indictment with unlawful possession of heroin with intent to distribute same in violation of Title 21, United States Code, Section 841(A)(1). Evidence of the offense was seized at an apartment in Detroit, Michigan, at 2017 Burlingame, Apartment 202 (TR-46).

The entry into the apartment was made without benefit of a search warrant and while no one was home (TR-36-53).

Defendant Thomas Griffin was under arrest at a different location prior to the entry, and defendant Catherine Tucker was arrested by agents already in the apartment when she attempted to enter the apartment (TR-26-53).

Defendants filed a motion to suppress the evidence on the grounds that it was seized in violation of the Fourth Amendment (TR-46). The Court below reviewed the motion filed by the defendants and their memorandum, the Government's reply to the motion, and their memorandum of law attached to it, and in addition heard arguments and testimony of one agent.

The Court held in its filed Opinion that ". . . the Government has not met its burden in this case of showing that exigent circumstances did in fact exist to justify the warrentless entry into the apartment and the warrantless search. Griffin and Dudley were both in custody. The officers had it in their control to protect the apartment against entry by any of the other unspecified persons whom they feared might seek to remove or destroy the evidence. The apartment had remained under continuous surveillance from 12:30 to 4:30 [P.M.] or perhaps even later. And in fact, I might point out that in the Affidavit, it says the apartment was under surveillance even at 10:30 that morning. But I am willing to look at this even in a light most favorable to the Government and look at the time factor as being from 12:30 to 4:30 [P.M.]. And there was no reason to believe that anyone had entered the apartment and was in a position to jeopardize the evidence" (TR-52-53).

On appeal the Government abandoned its argument that exigent circumstances justified the warrantless entry and conceded that the entry was illegal. It argued instead that the exclusionary rule should not have been applied in this case because the discovery under the circumstances was inevitable without any reference to the illegal entry.

The Court of Appeals held that in the absence of exigent circumstances, "the police clearly may not force entry to a home without a search warrant simply because they think they have probable cause to believe evidence of [a] crime may be found therein." Also, that the government's reliance upon the Fitzpatrick case was misplaced (Pet. App. 3a, 4a).

ARGUMENT

The Court of Appeals properly held that the District Judge was clearly right in finding that the Government had not established exigent circumstances to warrant the forceable entry without a search warrant. The evidence showed unequivocally that this case did not involve hot pursuit, or, as the Court pointed out, did the Government present proofs which established its theory that the evidence it sought was in danger of destruction.

Under the Government's theory, any agent would have the authority to enter a person's home for the sole purpose of "securing". As to this theory the Court of Appeals properly held that ". . . the assertion by police (after an illegal entry and after finding evidence of crime), that the discovery was 'inevitable' because they planned to get a search warrant and had sent an officer on such mission, would as a practical matter, be beyond judicial review." *Johnson* v *United States,* 333 U.S. 10, 92 L. Ed. 436, 68 S. Ct. 367 (1948). See also *United States* v *Jeffers,* 342 U.S. 48, 98 L. Ed. 59, 72 S. Ct. 93 (1951).

In *People* v *Fitzpatrick,* 32 NY 2nd 499, 300 NE 2nd 139 (1973), a principal ~~case relied upon by the~~ Government, the gun in question was found where the defendant was arrested. As stated in that case ". . . it was entirely fortuitous

that the police delayed the search of the immediate area where the defendant was discovered until they had begun questioning him and, as a result, very quickly learned where the gun was located."

As the Court of Appeals stated "None of these factors are present in our current fact situation . . ."

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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